

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a Reasonable)
And Timely Fashion, and Possible Steps)
To Accelerate Such Deployment)
Pursuant to Section 706 of the)
Telecommunications Act of 1996)

CC Docket No. 98-146

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REPLY OF AMERITECH

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Ameritech submits this reply to comments filed in response to the Commission's Notice of Inquiry in this proceeding.¹ Approximately 80 parties, from all segments of the communications industry, have participated in this important statutorily required Inquiry. These comments demonstrate that §706 is a de-regulatory mandate that requires the Commission to "remove barriers" to encourage deployment of advanced telecommunications capability, by multiple providers, using multiple technologies to benefit "all Americans." Some deployment of advanced capability has begun. However, as shown in the comments, the Commission could greatly accelerate these customer benefits by removing regulatory barriers that are very much dampening such investment by incumbent local exchange carriers ("ILECs"). In short, the sooner the Commission acts, the sooner it will meet its statutory mandate.

¹ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (released August 7, 1998) ("NOI").

I. INTRODUCTION AND SUMMARY.

In the NOI, the Commission asks fundamental questions about regulation and its impact on advanced telecommunications capability. In particular, the Commission seeks comment on whether advanced telecommunications capability is being deployed in a reasonable and timely manner and, if not, what should be done to remove barriers to infrastructure investment.

In this reply, Ameritech responds to three points made in the comments. First, Ameritech shows that the past legacy regulatory model, designed to make existing essential facilities available, has no application to the deployment of new advanced telecommunications capability. Second, Ameritech demonstrates that the misguided application of the legacy regulatory model is slowing and will continue to slow advanced deployment by ILECs and others. Finally, because §706 is a deregulatory statutory mandate, the Commission must remove these barriers. Ameritech articulates specific regulatory relief that would significantly encourage advanced deployment by ILECs and, therefore, satisfy the “reasonable and timely” deployment objectives of §706.

First, Congress’s directive in §706 underscores the fact that the Commission is at a watershed point in its implementation of the national policy enacted by Congress. The Commission must recognize, as Congress did, that the backward-looking legacy model of regulation -- designed to control incumbent providers with essential facilities -- has no place in the rapidly-evolving future world of advanced telecommunications capability. Rather, the regulatory mandate in §706 is to encourage investment in new advanced capability by removing, not creating or maintaining, regulatory barriers.

The legacy model does not apply because any investment by an ILEC in new advanced capability would not be a “bottleneck” or an “essential facility.” In fact, the comments in this

proceeding demonstrate that any "bottleneck" position that ILECs may have occupied in the world of "plain old telephone service" ("POTS") does not translate into the world of advanced telecommunications capability. And, while several parties continue to almost sloganize their claim that ILECs maintain a "strangle hold" on the "last mile" for advanced telecommunications capability deployment, the symbol that they offer in support of their argument -- the ILEC local loop -- is not the only option, and from a comparative perspective, is of limited value in the deployment of advanced telecommunications capability -- especially in rural contexts.

As most of the comments vividly demonstrate, broadband advanced telecommunications capability is being actively deployed by almost all segments of the communications industry, except by ILECs. For example, cable companies alone are investing billions of dollars to upgrade their systems to provide interactive broadband services and competitive local telephone service. As the National Cable Television Association ("NCTA") acknowledges:

This rapid growth is attributable to the stable and predictable regulatory environment under which cable has recently been operating, as well as the Commission's "hands off" approach to regulation of the Internet and cable-provided high speed data services.²

Likewise, competitive local exchange carriers ("CLECs") are also building broadband networks. Terrestrial and satellite-based wireless networks offer additional alternatives. In short, multiple providers are deploying multiple broadband facility systems in an increasingly competitive environment. NCTA correctly concludes:

As a result, there is no bottleneck -- in the "backbone" network or in the "last mile" -- that would prevent subscribers from gaining access to any information service.³

² NCTA at i.

³ *Id.* at ii.

That is the good news. Unfortunately, due to regulatory barriers and uncertainty, most ILEC's, including Ameritech, have not been able to justify widespread investment in advanced capability. And, that is very bad news.

Most ILECs have announced a commitment to xDSL technology, and some have begun to make limited deployments. However, like Ameritech, most ILECs are concerned with the regulatory barriers and uncertainty associated with any deployment they may make of advanced telecommunications capability. In particular, out-moded LATA boundaries and the blind application of a legacy regulatory model, focused on the concept of the essential facilities and not on encouraging the development of new advanced technology, are chilling much ILEC investment. For example, on October 5, 1998, Ameritech Chairman Richard Notebaert commented on Ameritech's flat capital spending projections:

The single largest determinant of the amount of investment we make and the jobs we create is the FCC in Washington and what we're allowed to do.

In this light, the regulation of ILECs as if they held a bottleneck in the deployment of advanced telecommunications capability serves no useful purpose. Moreover, it results in substantial harm. The high cost of such regulation is that it discourages deployment of advanced telecommunications capability by both ILECs and others.

Section 706 requires the Commission to "remove barriers" if regulation is impeding the deployment of advanced telecommunications capability in a "reasonable and timely" manner. Notwithstanding the significant and widespread deployment by some sectors of the communications industry, the fact is that regulatory barriers are impeding ILEC deployment of advanced telecommunications capability. Without the full participation of this significant potential group of providers, widespread deployment of advanced capability will be neither reasonable nor timely. Therefore, as a policy matter, and as a legal matter, the Commission

should remove regulatory barriers that hinder "reasonable and timely" advanced deployment by any industry participant, including incumbent LECs. In particular, the Commission should grant the specific relief requested herein by Ameritech.

II. THE DEREGULATORY MODEL OF §706 -- NOT THE LEGACY MODEL BASED ON ESSENTIAL FACILITY -- MUST BE APPLIED TO ADVANCED TELECOMMUNICATIONS CAPABILITY.

Congress created a number of frameworks to implement the deregulatory, procompetitive policies of the 1996 Telecommunications Act. One, based on the backward-looking legacy regulatory model, was designed to make existing essential facilities available to new entrants. Sections 251(c) and 251(d)(2) address these objectives. On the other hand, Congress realized that this legacy model would not apply, nor should apply, to the deployment of new advanced technology. To meet new forward-looking objectives, Congress enacted provisions that would encourage investment by all industry participants and remove regulatory barriers to that investment. The purpose of §706 is to meet this congressional objective of encouraging new advanced telecommunications capability. To accomplish this purpose, the Commission must apply the policy directives §706, which are reflected in §230 as well, to ensure reasonable and timely deployment by all participants regardless of technology. Contrary to the rhetoric of some of the comments, the legacy model -- based on the existence of essential facilities -- has absolutely no application to the deployment of new advanced capabilities.

A. The Backward-Looking Legacy Regulatory Model.

Historically, "utility" regulation of telephony focused on encouraging high penetration levels by keeping prices low for certain selected classes of customers through a system of geographical and inter-service subsidies. The carrier's rates were limited to levels targeted at a

"reasonable" return. In exchange, the carrier was given an exclusive franchise -- typically as a matter of state law.

Later, public policy evolved to encourage competition in areas that came to be considered as "peripheral" to the core telephone operations -- e.g., "inter-city" services and CPE -- as well as new services to the extent that they might rely on some telecommunications element -- e.g., computer processing and enhanced services.⁴ Rules were added to ensure fair use and open availability of any existing "bottleneck" or essential facilities that were part of the core business and necessary for the competition sought to be protected. Those protections came in the form of interconnection standards and reliance on nondiscriminatory tariffed rates for essential telecommunications services.⁵

These regulatory principles of open access and mandatory unbundling are premised on the essential facilities doctrine.⁶ The concept of essential facilities, however, is limited. An essential facility is a productive input that others cannot duplicate feasibly or economically. The economic theory is that the essential facility should not be duplicated because the market is served at minimum cost with one facility. An essential facility is similar to a barrier to entry in that a competitor cannot feasibly or economically duplicate a facility in a market. Thus, the argument goes, an existing facility will not be duplicated because an entrant would incur irreversible investment costs. The standard remedy for the existence of an essential facility is a mandate that competitors receive equal access to that facility.⁷ Therefore, inherent in this model

⁴ See, e.g., *In the Matter of Second Computer Inquiry*, Final Order, 77 FCC 2d 384 (1980).

⁵ See, e.g., *In the Matter of Third Computer Inquiry*, Report and Order, 104 FCC 2d 958 (1986).

⁶ See, *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

⁷ J. Gregory Sidek and Daniel F. Spulper, *Deregulatory Takings and the Regulatory Contract* (Cambridge University Press 1997 at 48-50, 88-90).

are requirements that the essential facilities must currently exist and that the facilities are necessary to provide a service in competition with the monopolist. As the evidence shows, these static and backward-looking concepts have no applicability to the future facilities and technologies that “can be” as advanced telecommunications capability evolves.

Section 251(c) is Congress’s application of this essential facilities legacy regulation model to competition for local exchange and exchange access services. It is based on an operating assumption that access to unbundled network elements (“UNEs”) and resale may be “essential” to give local competition a foothold. However, it is not unlimited. Like the essential facilities doctrine itself, §251(c)(3) unbundling requirements apply only to existing facilities functions.⁸ Moreover, via §251(d)(2), the Commission is effectively directed to look at the “essentiality” of the particular network element being requested. At a minimum, the Commission must consider the necessity of any element that is proprietary and whether the requester’s ability to provide service would be impaired by an inability to obtain the access.

B. The Forward-Looking Investment Model of §706.

Yet, this essential facilities model is not the only framework in the 1996 Act. In §706, Congress requires the Commission to approach advanced telecommunications capability differently, in a forward-looking manner -- to de-regulate in order to remove barriers and facilitate “reasonable and timely” deployment. This view emanates from the simple recognition that there can be no existing bottleneck for new facilities and that existing facilities are not “essential” if new facilities/technologies are able to duplicate or replace those facilities. In fact, in §706 Congress itself requires that “advanced telecommunications capability” be viewed “without regard to any transmission media or technology”. The concept of an essential facility

⁸ In *Iowa Utilities Board v. FCC*, 120 F.3d 753 at 812-13 (8th Cir. 1997), the Court held that an ILEC’s unbundling

of necessity would embody a static view of the nature of the transmission medium and technology used to provide advanced telecommunications. In this light, it would be folly and completely contrary to Congress' intent to assume that essential facilities can exist in this area.

Section 706 is not unique in expressing Congressional preference that old rules not apply to new advances in communications technology and services, such as digital packet switching and broadband access to the Internet. In fact, §706 is to advanced telecommunications capability what §230 is to the Internet. In §230, Congress articulates a policy of promoting the continued development of the Internet -- particularly "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."⁹ In that regard, the Commission's own Office of Plans and Policy, in its recent report on "Internet Over Cable",¹⁰ summarized:

Currently the over-arching consensus among domestic policy makers is that the government should recognize the unique qualities of the Internet, and avoid unnecessary regulation and undue restrictions on electronic commerce conducted over the Internet.¹¹

Further, in its April 10 Report to Congress on Universal Service, the Commission noted, in advocating a "hands-off" approach to the Internet:

Our findings in this regard [that Internet access providers should be classified as information service providers] are reinforced by the negative policy consequences of a conclusion that Internet access services should be classified as "telecommunications." We have already described some of our concerns about the classification of information service providers generally as telecommunications carriers. Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that

obligation applies only to its existing network -- "not to a yet unbuilt superior one."

⁹ Section 230(b)(2). See also §7 of the Communications Act (47 U.S.C. §157) added in 1983, which articulates a national policy to encourage the provision of new technologies and services to the public and provides for special expedited regulatory treatment.

¹⁰ "Internet Over Cable: Defining the Future in Terms of the Past" OPP Working Papers Series 30, August, 1998 ("Internet/Cable Report").

¹¹ *Id.* at 2.

legacy regulatory frameworks are appropriately applied to it.¹² [Citations omitted. Emphasis added.]

The “negative consequence” of “legacy regulatory frameworks” on a new and evolving technology/service such as the Internet applies with equal force to advanced telecommunications capability. As the author of the Internet/Cable Report notes more generally:

It is increasingly likely that the above-mentioned regulatory categories [cable, telecommunications, wired, wireless, information service provider] painstakingly established over many years to further particular policy goals, must necessarily collapse of their own weight in the digital communications world of tomorrow. The challenge for the regulator, at each step, is to examine the underlying purposes and policy goals behind existing regulatory categories, and to apply them only where those purposes and policy goals make sense.¹³

In the unfolding world of advanced telecommunications capability involving new technologies, no existing facilities are essential. Applying a legacy regulatory model based on the essential facilities paradigm -- one which in fact inhibits the deployment of advanced telecommunications capability “on a reasonable and timely basis”¹⁴ -- simply makes no policy sense.¹⁵

III. THERE IS NO REASON TO APPLY THE LEGACY REGULATORY MODEL TO ILEC DEPLOYMENT OF NEW ADVANCED TELECOMMUNICATIONS CAPABILITY.

As discussed above, the concept of essential facilities is the underlying justification for the legacy regulatory model of §251(c), which requires the unbundling by ILECs of their existing local exchange facilities and the resale of the telecommunications services provided by

¹² *In the Matter of Federal-State Joint Board on Universal Service*. CC Docket No. 96-45, Report to Congress, FCC 98-67 (released April 10, 1998) (“April 10 Report to Congress”) at ¶82.

¹³ Internet/Cable Report at 117.

¹⁴ See §IV, *infra*.

¹⁵ On the other hand, if the Commission decides that one deployment channel must be regulated, then the concepts of competitive and technological neutrality embodied in §706 demand that all other channels be similarly regulated. Although regulation in that case will still distort and inhibit deployment, the distortion will be somewhat mitigated.

over facilities. However, §706 recognizes that the deployment of new advanced telecommunications capability clearly would not involve “an essential facility” and, therefore, should not be subject to such regulatory requirements if they create barriers to investment and deployment. Nonetheless, the misguided arguments of some commenters in this proceeding claim that the legacy regulatory model must be applied to new advanced telecommunications capability and advanced services deployed and offered by ILECs. Their arguments are invalid and should be rejected by the Commission for at least four reasons.

First, any new deployment of advanced telecommunications capability by the ILEC would not be an essential facility because there are many alternatives. The multiple technologies currently available for advanced telecommunications capability include competitive xDSL services, cable access networks (including coaxial cable and fiber optic cable), fixed wireless services and satellite networks. In contrast, the essential facilities argument underlying §251(c) implies that the ILEC metaphorically owns and controls a bridge that crosses a river at the only feasible crossing point. To extend that analogy, the availability of multiple transmission vehicles is sufficient to establish that there are many other ways to “cross the river.”

Second, the essential facilities argument does not apply to deployment of advanced telecommunications capability by ILECs because entry into the advanced broadband services has already occurred by others, most notably cable operators. The economic viability of competitors that supply advanced telecommunications services using advanced telecommunications capability establishes that others can economically construct alternative facilities. Thus, it is not only technically feasible to construct advanced telecommunications capabilities, but also economically feasible.

by its even application across industry segments.

Third, although the ILEC's local loop is clearly no longer an essential facility in connection with advanced telecommunications capability, the Commission's regulations still provide access to the incumbent's loops and require appropriate collocation arrangements for providers of advanced capability. These issues are being thoroughly debated in the context of the Commission's 706 NPRM,¹⁶ and, therefore, Ameritech will not dwell on them in this docket. However, the existence of these unbundling and collocation provisions with respect to the incumbent's local loops again serves to invalidate the essential facilities argument with respect to any advanced telecommunications capability deployed by the ILEC -- even if the local loop is considered a facility that could not be duplicated (which is belied by the claims of the cable industry and wireless industry in this docket). The unbundling provisions regarding the local loop eliminate any advantage that an ILEC could otherwise gain by deploying advanced telecommunications capability above and beyond the loop and offering advanced services.

Fourth, as a technical matter, loops are not essential for deployment of advanced telecommunications capability. In fact, as the comments demonstrate, the local loop is not only not the only option, it may not be the best option in certain circumstances.

A. There Are Other Alternatives That Are Being Deployed.

The comments of other parties provide substantial evidence that there are other alternative technologies for deploying advanced telecommunications capability, and that such alternatives are being offered in the market.

For example, to support the growth and demand for Internet access and other advanced two-way services, cable companies are accelerating the upgrade of their existing coaxial cable

¹⁶ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, etc.*, CC Docket Nos. 98-147, et al. Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (released August 7, 1998) ("706 NPRM").

systems with fiber optic technology. These hybrid fiber-coaxial or HFC networks, described in the comments of the cable industry, permit cable modems to offer customers a range of high speed data services at speeds 50-100 times faster than traditional telephone modems. According to the cable industry, access to Internet and advanced services over cable lines provide customers with three primary benefits: speed, capacity and freedom.¹⁷

Deployment by cable systems of broadband Internet access is occurring at a rapid rate. Cable companies have concluded that broadband Internet access can be a viable commercial venture. For example, each of the eighteen largest cable companies, and many smaller companies, are rolling out cable modem service to the communities they serve. Cable modem services are now available in portions of at least 40 states. Deployment ranges from the largest to the smallest communities. This advanced deployment by cable operators has resulted in significant growth in the number of cable modem service customers, increasing from approximately 10,000 customers in February, 1997, to some 300,000 customers today, a rise of more than 2,900 percent. By the end of this year, 500,000 to 700,000 customers are expected to subscribe to cable's high speed Internet access service.¹⁸ This broadband Internet access over cable will be offered to more than 67 million cable homes by 2005.¹⁹

It is perhaps ironic that certain parties now regard cable as the bottleneck for advanced telecommunications capability. Circuit City claims that the cable industry will be a bottleneck for access to broadband data services unless it is subject to Title II common carrier regulation.²⁰ Similarly, AOL suggests that, because cable operators possess a last mile infrastructure, they

¹⁷ NCTA at 4-5.

¹⁸ *Id.* at 9-10.

¹⁹ *Id.* at 8. The August, 1998, Forrester Report estimates that by 2002, 16 million of U.S. households -- 25% of all those "on-line" -- will use broadband connections and that 80% of those will use cable-based services.

should be required to provide broadband access to unaffiliated ISPs on a non-discriminatory basis.²¹ These claims are strong evidence of the fact that ILECs have no essential facility in this area.²²

It is interesting to note AT&T's intellectual gymnastics with respect to cable as an alternative vehicle for the deployment of advanced telecommunications capability. AT&T, of course, does not want to dampen its claim that ILECs have a monopoly on the "last mile" for advanced telecommunications capability. Therefore, it speaks of the modifications necessary for cable systems to permit two-way communications.²³ Nonetheless, AT&T also discusses its own commitment to invest what is necessary in TCI to provide high speed data and telephone services over two-way broadband facilities to the 17 million households currently passed by TCI.²⁴ Thus, AT&T whines about the "necessity" for ILECs to unbundle their facilities to provide a conduit for advanced telecommunications capability at the same time that it boasts of its commitment to a relatively short term (3 years) implementation of a complete bypass of ILEC facilities to provide advanced telecommunications capability. Presumably, if AT&T believes that new yet-to-be-deployed advanced capability of an ILEC should be unbundled, it would agree that the existing and functionally equivalent (if not superior) advanced capability of the proposed AT&T/TCI network should be treated the same.

Cable operators, however, are by no means the only other source of advanced telecommunications capability. Power utilities have a ubiquitous presence and offer a substantial

²⁰ Circuit City at 2-3.

²¹ AOL at 9-10.

²² It is important to consider that cable systems pass more than 97% of U.S. homes and have achieved a penetration level of more than 66%. See CS Docket No. 97-141, Fourth Annual Report, FCC 97-423 (released January 13, 1998).

²³ AT&T at 12-13.

opportunity. The American Public Power Association ("APPA") boasts that the nation's power utilities are ready to provide advanced telecommunications capability with extensive fiber networks:

Because public power utilities are structured to provide low cost service, they can make advanced telecommunications services affordable to all sectors of the communities they serve.²⁵

Also, Media Fusion and Nortel discuss the development of technology to utilize the nation's power grid as a distribution vehicle for advanced telecommunications capability.²⁶ Media Fusion expects to have its first system installed and being tested by the end of 1999.

Wireless technologies also offer additional vehicles for advanced telecommunications capability. For example, SkyBridge and Teledesic discuss their plans for deploying a global broadband satellite system that will bring advanced telecommunications capability to all Americans.²⁷ Such a system would offer a high-bandwidth "last mile solution" that would also address accessibility for rural, high cost, and sparsely populated areas.²⁸ SkyBridge plans to begin operations in 2001. Nortel, WinStar, Teligent, CTIA, and PCIA also discuss the role that wireless services should play in the deployment of advanced telecommunications capability.²⁹

Similarly, New World Paradigm offers its "wireline" alternative to an ILEC loop based distribution system. Its discussion of cost and economic feasibility is insightful:

The biggest expense we see is construction cost. But any company doing an overbuild faces a construction cost. . . . The [FCC's] assumption that the construction of new technology and fiber based systems is expensive is a technology bias that contradicts the

²⁴ *Id.* at note 42.

²⁵ APPA at 14.

²⁶ Media Fusion at 3; Nortel at 11.

²⁷ SkyBridge at 2-3; Teledesic at 2-5.

²⁸ SkyBridge at 7-8; Teledesic at 2.

²⁹ Nortel at 12, WinStar, Teligent, CTIA, and PICA, *passim*.

sentiment expressed in the opening paragraph of the NOI: [that advanced technology should have every opportunity to flourish]. Neither in this NOI nor in CC Docket 98-147 is there a citation to support the judgment that construction activity makes new technology any more "expensive" than efforts to improve embedded infrastructure.³⁰

In sum, there are many technologies that are at least as well developed (and in the case of cable modem service -- much more developed and more widely deployed) as the DSL-over-copper loop technology for distribution of advanced telecommunications capability. Thus, ILECs have no monopoly-based essential facility bottleneck with respect to that distribution capability and, therefore, they should not be regulated as if they do.

B. ILEC Facilities Are Not "Essential" to the Widespread Deployment of Advanced Telecommunications Capability.

With virtual unanimity, the commenting parties support a market approach toward the deployment of advanced telecommunications capability. Even non-ILEC carriers and Internet/information service providers ("ISPs") pay lip service to the benefits of relying on an open market approach to the deployment of advanced telecommunications capability.³¹ AT&T goes so far as to concur with Ameritech's view on the definition of "reasonable and timely" articulated in §706. AT&T correctly states:

The Commission should recognize that a "reasonable and timely" rate of deployment would be whatever deployment would occur in a fully open and competitive market. . . . Equally important, because no one can predict the specific outcomes of that competitive process, the Commission should not try to predict them or to out-guess the market by adopting its own timetable.³²

However, the intellectual honesty of many of these parties stops at the borders of their own facilities backyard. Despite favoring an open-market approach, they nonetheless continue to call for rigorous regulation of ILECs because ILECs allegedly maintain a "bottleneck."

³⁰ New World Paradigm at 9-10.

³¹ See, e.g., MCI/WorldCom at 11, Retail Internet Service Providers at 4.

³² AT&T at 24.

The issue of whether ILECs to have a "bottleneck" with respect to POTS local exchange service is a red herring which has no relationship to advanced telecommunications capability. First, Congress has stated that advanced telecommunications capability should have no association with any particular transmission medium or technology.³³ For this reason, New World Paradigm expresses dismay at the NOI's unjustified focus on the ILEC loop and DSL technology.³⁴ Second, as demonstrated above, ILECs have no "bottleneck" with respect to the "last mile" in the deployment of advanced telecommunications capability.³⁵ Moreover, because of technical limitations, the ILEC loop cannot be considered an "essential" facility for the widespread deployment of advanced telecommunications capability.

Indeed, the role of an ILEC loop with respect to the deployment of advanced telecommunications capability is for the most part limited to xDSL technology. But this technology does not currently support loops that extend more than 18 kilofeet from an ILEC central office (a common situation in rural areas); and, in many other cases, it requires expensive conditioning (removing bridged taps and loading coils) or network redesign (to eliminate intervening fiber and digital loop carrier systems that, under normal circumstances, provide significant efficiencies in loop distribution). These existing technical limitations affect nearly 50% of all of loops in Ameritech's case. With these existing limitations, ILEC loops cannot be

³³ §706(c)(1).

³⁴ New World Paradigm at 7.

³⁵ Most parties argue simply without elaboration that ILECs possess a monopoly on the last mile for advanced deployment. AT&T's attempt to make a more sophisticated argument in this regard falls short. AT&T's attempts to link ILECs' POTS bottleneck to advanced telecommunications capability are what could only generously be described as strained. First, AT&T claims simply, without explanation, that, by frustrating attempts of CLECs "to bring alternative offerings to the market for critical POTS services," ILECs have also hindered the rate of the deployment of advanced services as well. Second, AT&T alleges that, because ILECs have frustrated attempts at local exchange competition, they have given themselves "little incentive to develop and deploy new and different service offerings, including advanced services, to keep and attract customers." (See AT&T at 27.) AT&T's statements must be viewed as self-serving, conclusory, and without any basis in fact. As shown in §IV, *infra*, regulation poses perhaps the greatest deterrent to the deployment of advanced services by both ILECs and others.

regarded as an "essential" facility with respect to the distribution of advanced telecommunications capability -- especially "to all Americans" as contemplated by §706.

Moreover, the claims of Sprint and others that ILECs should be required to unbundle -- not only the loop -- but also any advanced telecommunications capability itself³⁶ goes well beyond any reasonable interpretation of the term "essential facility" and strains the concept beyond credulity. Any potential provider of advanced telecommunications capability -- if it desires to implement xDSL/loop technology -- can obtain unbundled loops from the ILEC and purchase and collocate its own digital subscriber line access multiplexers ("DSLAMs").³⁷ ILECs, however, simply have no bottleneck with respect to DSLAMs and the advanced capability itself.

IV. APPLYING THE BACKWARD-LOOKING ESSENTIAL FACILITY REGULATORY MODEL TO NEW ILEC DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY IS COUNTERPRODUCTIVE.

A. Legacy Regulation Discourages ILEC Investment.

Several parties complained that ILEC deployment of advanced telecommunications capability is slow or made only in response to competitive threats.³⁸ However, as Ameritech

³⁶ Sprint at 7-8. It is Ameritech's experience that in many cases in which CLECs request access to new elements in the context of negotiating interconnection agreements, those CLECs do not ultimately purchase those elements. It appears that, in these cases, CLECs are requesting new network elements that they do not need. As a result, these CLECs' claims that these elements are "essential" must be taken with a grain of salt and, before ILECs prepare to make the new elements available, the requesting carrier should be required to commit to a minimum purchase and compensate the ILEC for the costs incurred.

³⁷ Ameritech makes loops available with reasonable conditioning and offers collocation for DSLAMs. See Ameritech's Comments filed September 25, 1998, in response to the Commission's 706 NPRM.

³⁸ See, e.g., AT&T at 2, Sprint at 4.

Certain parties also complain that mergers drain ILEC cash that could otherwise be spent on network upgrades. These claims are misguided. Geographical mergers bring benefits of legitimate scale and scope economies which, all things being equal, free up dollars for additional investments.

Similarly, the claim of New Networks Institute ("NNI") that Ameritech is not living up to its investment commitments in Ohio must be dismissed. First, NNI confuses Ameritech's New Media subsidiary, which provides cable service, with Ameritech Ohio, the ILEC. Ameritech Ohio did make infrastructure commitments in connection

demonstrated in its comments, legacy regulation of ILECs in the context of advanced telecommunications capability naturally results in failure of §706 objectives -- i.e., the deployment of advanced telecommunications capability is not occurring "on a reasonable and timely basis."

Again, as Ameritech noted, the unbundling and wholesale discount requirements of §251 of the Act and the Commission's cost-plus pricing restrictions for new services provide every incentive for ILECs not to spend shareholder dollars investing in advanced telecommunications capability. Under this regime, the end result of any ILEC innovation would be to turn it over to competitors at bargain rates or to sell services at a price substantially under which the market will value those services. In simple terms, such regulation precludes ILECs from reaping the benefits that the market would otherwise confer on innovators and from being adequately compensated for undertaking the risk of innovation. The virtual plea of cable providers and ISPs for the Commission not to impose Title II or other similar regulatory paradigms to their niches validates this view -- such regulation will only stifle innovation and delay deployment of advanced telecommunications capability.³⁹

In addition, as explained in Ameritech's 706 petition and in its comments submitted September 25 in response to the 706 NPRM, §271 interLATA restrictions applied to advanced telecommunications capability virtually preclude BOC's from deploying advanced networks to serve rural and high cost areas. Specifically, as Ameritech noted in its 706 NPRM comments, 25

with Advantage Ohio case before the Public Utility Commission of Ohio ("PUCO"). Ameritech has never tried to satisfy those infrastructure commitments by relying on investments made by Ameritech's New Media cable subsidiary. On March 9, 1998, Ameritech Ohio filed its annual commitment progress report with the PUCO. The report detailed the progress made toward achieving commitments in Infrastructure, Blocking, Community Computer Centers/Funding, Distance Learning Equipment/Funding, Economic Development, Educational Team, Flat-Rate Service, ISDN Promotion, Lifeline/Universal Service Assistance, Public Input Surveys, and School Discounts. The report demonstrated that Ameritech Ohio is meeting or exceeding all of its commitments.

³⁹ See, e.g., NCTA at 25, e.spire at 4.

of the 32 LATAs in Ameritech's region have insufficient network access lines to justify investment in mass market deployment of advanced telecommunications capability facilities at this time. That barrier, however, would be removed if Ameritech were permitted to offer advanced telecommunications capability services across existing LATA boundaries. Ameritech could aggregate data traffic from exurban areas and transport it to switches in nearby urban areas, substantially reducing the cost of serving low density areas. This relief would permit Ameritech to compete for heavy users of data services, the revenues from which would justify investment in deploying advanced networks to these low density areas.

Ameritech also echoes the concern raised in the comments of SBC as to another potential barrier to deployment of advanced telecommunications capability. Specifically, SBC points out the need for large amounts of spectrum free from arbitrary or artificial restrictions on who can be a licensee.⁴⁰ Current limitations on ILECs and cable operators from bidding in LMDS auctions or holding LMDS licenses for a specified period of time preclude these industry players from utilizing spectrum that could offer a potential alternative deployment avenue for advanced telecommunications capability.

B. Legacy Regulation Discourages Innovation By Others.

Perhaps the most enlightened statement in all the comments offered in response to the NOI is that of WinStar, a facilities-based CLEC. It notes that it is not subject to "the economic inefficiencies or antiquated technology often associated with ILEC services."⁴¹ Consistent with this thought, it offers:

Resale or relying on access to unbundled network elements, in the long run, simply will not result in innovative [advanced telecommunications services].⁴²

⁴⁰ SBC at 13.

⁴¹ WinStar at 19.

⁴² *Id.*

Certainly, making the loop available for advanced telecommunications capability deployment will not encourage the development of alternatives. And, while Ameritech and other ILECs offer their loops on a non-discriminatory basis for other carriers use in the deployment of advanced services, it is apparent from the demands of some CLECs that they do not have any intention of using those loops for innovation. The “beyond-the-loop” demands of Sprint and others for access to the unbundled advanced telecommunications capability itself is a sure indication that none of the requesting carriers has any intention of doing anything technologically innovative. Moreover, requiring ILECs to unbundle their own advanced telecommunications capability provides an economic disincentive for enterprises such as Media Fusion and New World Paradigm who are committed to develop better alternatives. In other words, the Commission should be reluctant to make ILEC facilities the “cheap gas” that provides a significant economic disincentive to “alternative fuels research” (advanced telecommunications capability).

Another deterrent to facilities-based innovation and investment is the current misclassification of Internet traffic as local by state regulators, resulting in the payment of reciprocal compensation to CLECs. Covad Communication’s Chairman Chuck McMinn recently articulated the pernicious effect of this arrangement. Communications Daily reports Mr. McMinn as saying that reciprocal compensation should be abolished for calls to Internet service providers because it reduces the incentive for CLECs to upgrade to high-speed networks.⁴³ In addition, it actually discourages CLECs from competing in the local exchange market for customers who want to originate calls. CLECs naturally conclude that having customers who originate calls would subject them to having to pay large amounts of reciprocal compensation for long-duration calls to ISPs served by other LECs. Thus, the major incentive for CLECs today is

to be a POTS CLEC solely for the purposes of terminating traffic to ISPs and to thereby benefit from the reciprocal compensation cash cow.

V. CONSISTENT WITH §706, THE COMMISSION SHOULD REMOVE REGULATORY INVESTMENT BARRIERS TO ENCOURAGE DEPLOYMENT OF NEW ADVANCED TELECOMMUNICATIONS CAPABILITY BY ILECs.

To correct any regulatory-based disincentives and barriers to ILEC investment in advanced telecommunications capability and to eliminate any potential disincentive to such investment by non-ILECs, the Commission must ensure that the legacy regulatory framework applicable in the essential facilities environment is not applied to ILEC new deployment of advanced telecommunications capability -- where it does not belong. As the New York State Department of Public Service ("NYDPS") notes:

The competitive marketplace . . . should be allowed to develop in response to consumer demand for advanced technology, free from regulatory barriers.⁴⁴

To achieve this end, the Commission must take several steps.

First, the Commission should remove an existing barrier to BOC investment by permitting limited LATA boundary changes for advanced data services as requested by Ameritech. Specifically, the Commission should permit BOCs to provide state-wide advanced data services to multi-LATA customers, to concentrate such traffic across LATA boundaries to a single packet switch, and to carry it to the nearest network access point. This will enable BOCs to deploy advanced networks and offer advanced services in a manner that will be of particular benefit to customers in rural and less densely populated areas, thereby fulfilling the intent of Congress that such capability be available "to all Americans."

⁴³ Communications Daily, September 17, 1998.

⁴⁴ NYDPS at 1.

Second, using its authority under §251(d)(2), the Commission should clarify that, in light of Congress's directive under §706 of the Act, ILECs need not unbundle advanced telecommunications capability. Forcing ILECs to turn over advanced capabilities at bargain rates freezes ILEC innovation and deprives society of the benefits that development efforts by this large industry segment could bring. At the same time, it also discourages others to undertake innovative steps on their own while they rely on what they can get cheaply from the ILECs. In that regard, the Commission should also clarify that ILECs are not required to make substantial modifications to existing unbundled elements -- such as frequency unbundling on loops -- solely to benefit the provision of advanced telecommunications capability by others. This also will eliminate a substantial disincentive to the development of non-ILEC-loop deployment vehicles.

Third, under the auspices of §10 and in light of the mandate of the §706, the Commission should find that LEC-provided advanced services utilizing advanced telecommunications capability are not subject to cost-plus pricing restrictions. Such restrictions do nothing but force innovators to offer advanced services at "clearance" prices. The inability to price a new service at the level at which the market values the new service actually under-compensates the innovator for the risks of innovation and the cost of unsuccessful attempts. Removing pricing restrictions will stimulate ILEC innovation by permitting ILECs to be appropriately compensated for those risks.

Fourth, the Commission should make sufficient spectrum available to enable wireless technologies to provide advanced telecommunications capability and should eliminate unreasonable eligibility restrictions on who may be licensed for that spectrum.⁴⁵ This will

⁴⁵ Chairman Kennard recently stated his intent to propose a series of proceedings later this year to promote alternative wireless networks to compliment the current proceedings under §706. Remarks to the Personal Communications Industry Association of America, September 23, 1998.

eliminate the artificial regulatory barriers that hinder the full development of robust wireless alternatives for advanced telecommunications capability

Fifth, the Commission should correct the distortion caused by the current mischaracterization of ISP traffic as "local." Specifically, the Commission should find that such traffic is interstate in nature and, therefore, not subject to the reciprocal compensation obligations stated in §251(b)(5). This will remove the current disincentive for CLECs to develop their own broadband Internet access arrangements and to compete for originating local exchange traffic.

If the Commission makes these rulings, it will virtually assure that the goals of §706 are achieved. These changes will permit the market to give undistorted economic signals to dictate the manner and the timing of the deployment of advanced telecommunications capability so that that deployment will in fact take place "on a reasonable and timely basis."

VI. CONCLUSION.

In §706, Congress compels the Commission to look forward when examining the appropriateness of applying regulation to advanced telecommunications capability. In following Congress's mandate, the Commission should not apply the backward-looking legacy model of regulation to the rapidly-evolving world of advanced telecommunications capability. The evidence precludes this approach.

Advanced telecommunications capability is being deployed by some segments of the industry. However, the prospect that the Commission may impose the legacy model of regulation on ILEC provision of advance telecommunication services has created significant disincentives to ILEC investment and participation in the innovative efforts Congress sought to foster. Unless changed by the Commission, this will ensure that deployment will not be on a reasonable and timely basis.